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No. 402

In the Supreme Court of the United States

OCTOBER TERM, 1961

BROWN TELECASTERS, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION AND TELEVISION BROADCASTERS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–10a) is reported at 289 F. 2d 868. Its order denying rehearing (Pet. App. 11a) is not yet reported. The decision and order of the Federal Communications Commission (J. App. 137–194)[1] is reported at 27 F.C.C. 727, and its opinion and order denying rehearing (J. App. 222–228) at 28 F.C.C. 257.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1961. Rehearing *en banc* was denied

[1] "J. App." refers to the joint appendix in the court of appeals.

on June 12, 1961 (Pet. App. 10a), and rehearing by the panel which heard the case was denied on June 14, 1961 (Pet. App. 11a). The petition for a writ of certiorari was filed on September 12, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1) and Section 402(j) of the Communications Act of 1934, 47 U.S.C. 402 (j).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that petitioner was barred from challenging the factual basis for the ruling of the Federal Communications Commission that good cause had been shown for waiver of its rule requiring that a broadcasting studio be located in the principal community to be served by a television station.

2. Whether the court correctly ruled that, in the absence of any error which petitioner could properly assert, a remand to the Commission would not serve any public interest.

STATUTES AND REGULATIONS INVOLVED

Pertinent sections of the Communications Act of 1934 (48 Stat. 1064, as amended, 47 U.S.C. 151, *et seq.*), the Administrative Procedure Act (5 U.S.C. 1001, *et seq.*), and the Commission's Rules and Regulations are set out in Appendix B of the petition (pp. 12a–19a).

STATEMENT

On November 6, 1959, the Federal Communications Commission granted the application of Television Broadcasters, Inc. ("Television Broadcasters") for modification of its existing construction permit for a television station in Beaumont, Texas, to specify very

high frequency (VHF) Channel 12 in lieu of ultra high frequency (UHF) Channel 31, and denied the competing application of Brown Telecasters, Inc. ("Brown") for Channel 12 (J. App. 191–192).[2] This action followed a comparative proceeding begun on August 8, 1957 by a Commission order designating their mutually exclusive applications for hearing on the following issues (J. App. 137–138):[3]

> To determine whether good cause exists for a waiver of Section 3.613(a) of the Rules with respect to the main studio proposed by Television Broadcasters, Inc.
>
> To determine on a comparative basis which of the operations proposed in the above-captioned applications would best serve the public interest, convenience and necessity in the light of the record made with respect to the significant differences among the applicants as to:
>
> (a) The background and experience of each having a bearing on its ability to own and operate the proposed television broadcast station.
>
> (b) The proposals of each with respect to the management and operation of the television broadcast stations.
>
> (c) The programming service proposed in each of the above-captioned applications.
>
> To determine in the light of the evidence adduced pursuant to the foregoing issues, which of the applications, if any, should be granted.

The studio site proposed by Television Broadcasters in its application was five miles outside the city of

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[2] There were two other applicants in the administrative proceeding, who are not involved here.

[3] Four additional issues were originally designated but subsequently became moot.

Beaumont, and was the same studio used in its previous UHF operation[4] pursuant to a waiver of Section 3.613 of the Commission's Rules (47 C.F.R. 3.613). That section provides that the "main studio of a television broadcast station shall be located in the principal community to be served" unless good cause is shown for the use of another location. In designating an issue in the hearing with respect to waiver of Section 3.613, the Commission was unaware that Television Broadcasters was proposing the same studio site for which a waiver had previously been granted, because the site description in the application was worded differently from that in the existing UHF authorization (J. App. 147, 180–181).[5]

Prior to the hearing, Television Broadcasters, by a petition filed on November 1, 1957, and a supplement filed on January 28, 1958, sought leave to amend its application to change the location of its studio to a site within Beaumont (J. App. 9–10, 73).[6] Although Television Broadcasters expressly disclaimed any intent to claim a preference on the basis of the change, Brown opposed the petition (J. App. 73, 230)

[4] Television Broadcasters had operated on a UHF frequency for approximately two years, ceasing operation on August 1, 1956, after sustaining losses upon the advent of new VHF stations in the Beaumont area (J. App. 142–143, 185).

[5] While the authorization described the site as "Near Vidor, U.S. Highway 90", the later application described it as "Near Beaumont, U.S. Highway 90" (J. App. 148, n. 11).

[6] In oral argument before the hearing examiner on this request, Television Broadcasters stated that the amendment was occasioned principally by the fact that a creditor was proceeding to have the UHF studio seized and sold in satisfaction of a debt and that its present intention was to locate a VHF studio in Beaumont (J. App. 230).

and the examiner denied leave to amend (J. App. 18–24).

During the hearing, counsel for Television Broadcasters stated on the record, on March 3, 1958, that it had lost title to the UHF out-of-town site (J. App. 361, 363). When counsel thereafter attempted to present evidence that the proposed studio site was nevertheless still available, the examiner sustained Brown's objection, stating (J. App. 361, 363–364):

> There is no legal question of the availability. There has been a lot of talk in prehearing and in the hearing as to the share of sale [*sic;* sheriff's sale] and so on, but it would have to be ignored, because it is not evidence.
>
> So far as I am concerned, you still have your old site.

On August 11, 1958, the hearing examiner released an Initial Decision (J. App. 71–136), in which he concluded that, on the basis of the comparative showings, a grant to Brown would better serve the public interest (J. App. 126–136). The Initial Decision, however, raised no question as to the availability of Television Broadcasters' proposed studio site. On the issue of whether good cause existed for a waiver of Section 3.613, the examiner held that the outstanding waiver for a UHF grant was not sufficient cause for waiver in connection with a VHF grant because, in his view, the Commission would not have included the issue in the hearing order had it been satisfied that the previously granted waiver was sufficient (J. App. 128).

All parties filed exceptions to the Initial Decision. Oral argument before the Commission was heard on July 10, 1959 (J. App. 140). Brown raised no question as to the availability of Television Broadcasters' proposed studio site either in its exceptions or in oral argument (J. App. 223). Television Broadcasters took exception (J. App. 66) to the examiner's denial of its petition for leave to amend the studio site proposal (*supra*, pp. 4–5).

On November 6, 1959, the Commission released its Decision granting the application of Television Broadcasters for modification of its construction permit on Channel 31 to specify Channel 12, and denying the application of Brown for a new construction permit on Channel 12 (J. App. 137–194). The Commission sustained the examiner's ruling denying Television Broadcasters leave to amend its studio site proposal, with the following explanation (J. App. 141, n. 5):

> As there is no competent evidence showing that the original site is not available; as no exception has been preserved to the Examiner's ruling that the original site is available; as the record is based on the use of the original site; and as there is no showing that a grant of the amendment would have significantly affected the Commission's ultimate comparative determination of the [proceeding], the Examiner's ruling will be sustained.

Treating the proposed site as available, and explaining that the issue had been put in hearing because the Commission had been unaware that it was the same site already granted a waiver, the Commission found

that good cause existed for waiver and that Television Broadcasters was not disqualified from comparative consideration. (J. App. 180–181, 192).[7] The Commission accorded Brown a preference for its proposed in-town studio site, but concluded that a grant to Television Broadcasters would better serve the public interest because of the latter applicant's overall comparative superiority, particularly on the factors of broadcast experience and local ties (J. App. 186, 191).

On December 7, 1959, Brown filed a petition for reconsideration and rehearing, based principally on the ground that Television Broadcasters had allegedly misrepresented the availability of its proposed studio site (J. App. 195–199). In an opposition pleading, Television Broadcasters stated that since its old UHF studio was now almost completely destroyed by vandalism, and a high purchase price was being asked for the property, it intended to seek authority to change the studio site to a location in Beaumont (J. App. 207–208). Television Broadcasters further stated (J. App. 208) that "should the Commission not approve a change in studio site to Beaumont, we can and will

[7] In connection with its finding of good cause, the Commission stated (J. App. 181):

"The feasibility of the site has been demonstrated by its use as a UHF studio. If we were to require compliance with the rule as a condition to a VHF grant the sums expended by the applicant in constructing the studio, pursuant to a waiver of the rule, would be largely wasted. Under the circumstances we believe good cause exists for waiver of the Rule, and that Television Broadcasters, despite urging of threshold disqualification, is entitled to comparative consideration."

re-purchase the old site or land in the immediate vicinity, and construct a new building."

The Commission denied Brown's petition, finding that Television Broadcasters had not misrepresented or concealed facts as to the availability of its proposed site (J. App. 222–223). The Commission also stated that the out-of-town site was not a factor that contributed to the selection of Television Broadcasters, but rather was a weak point in the application which was overcome by the applicant's overall merit (J. App. 223). The Commission noted that, in view of Television Broadcasters' earlier petition to amend its application to change the studio site, it was aware that the applicant might seek to locate its studio within Beaumont, and stated (J. App. 224):

> Such amendment could not have been permitted at that time for to do so would have allowed TB [Television Broadcasters] to escape the onus of an obvious comparative weakness, and, accordingly, worked an injustice on its opponents. Now that the hearing is completed and the Commission's choice has been made, no harm can come to either petitioner or the public should TB, by appropriate process, succeed in modifying its operation in such a way as to eliminate this weakness.

Finally, the Commission stated that its disposition of the matter presupposed that Television Broadcasters would file for authority to locate its studio within Beaumont and that if "future developments should prove this [supposition] unwarranted, the Commis-

sion would, of course, re-evaluate the modified TB proposal" (*ibid.*).[8]

On appeal, the court below (in an opinion by Judge Washington in which Judge Edgerton joined and from which Judge Danaher dissented) affirmed the order of the Commission (Pet. App. 1a–10a). The court found that the Commission's selection of Television Broadcasters was reasonable and was supported by the record (Pet. App. 5a). It also sustained the Commission's determination that Television Broadcasters had not been guilty of misrepresentation concerning its studio proposal (Pet. App. 5a). Without passing upon the validity of the Commission's finding of "good cause" for a waiver of Section 3.613(a) of the Rules, the court held (Pet. App. 3a–5a) that any possible error in that regard was not prejudicial. The court ruled that Brown's conduct in the administrative proceeding negated its claim of prejudice. It stated (Pet. App. 4a):

> It was only after the Hearing Examiner had been reversed on the acceptability of the site by the Commission, that Brown first asserted its unavailability, some two years after the matter had been raised in the proceedings. Brown's continued acquiescence in the understanding that the initial studio would be treated as available, is palpably inconsistent with any notion of

[8] Commissioner Lee, dissenting, was of the view that the record should be reopened for additional evidence as to the exact nature of Television Broadcasters' present studio proposal (J. App. 226).

> prejudice, in view of what the record shows it must have known.

The court further found (Pet. App. 4a–5a) that there could be no public injury, since Television Broadcasters received no comparative advantage from its original studio proposal and "especially in view of the fact that Television Broadcasters has secured Commission approval of a new studio site within the city limits, for which a waiver of the 'studio rule' is unnecessary."[9]

In denying rehearing (after the denial of rehearing *en banc*), the same majority of the panel rejected Brown's further claim that it was prejudiced because it did not learn until after the Commission's decision that Television Broadcasters had not taken steps to assure the availability of the initial site. On reexamination of the record, the court was satisfied that Brown knew about the loss of the site at an early stage of the proceedings, and therefore deemed it immaterial whether Brown knew about any efforts to retrieve the site. (Pet. App. 11a.)

ARGUMENT

Contrary to petitioner's contention (Pet. 15–16, 26–27, 30–31), this case presents no important questions of administrative law. It involves only the application of established principles to the particular facts here involved. Further review is accordingly unwarranted.

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[9] As the court of appeals noted (Pet. App. 2a), while the appeal was pending Television Broadcasters applied for, and was granted, authority to locate its studio in Beaumont.

1. Petitioner's argument (Pet. 15–22) that, in violation of the rules, the Commission disregarded an issue designated for hearing (whether good cause existed for waiving the studio-location requirement) is without factual basis. The Commission resolved that issue.[10] It granted Television Broadcasters a waiver of Section 3.613(a) of the Rules upon express findings that good cause had been shown for the out-of-town site proposal, and that Television Broadcasters was not disqualified by the location of its studio but was entitled to comparative consideration (J. App. 180–181, 192). It further stated its reasons for denying reconsideration when petitioner belatedly asserted that the site was unavailable (J. App. 222–224).

The decision of the court below was not that the Commission could decide the case without considering all of the issues, but rather that (Pet. App. 3a): "While there exists the possibility that the Commission erred in granting the waiver here at issue, it appears to us that appellant has not suffered such prejudice as would entitle it to relief." In taking "due account * * * of the rule of prejudicial error" (*ibid.*), the court of appeals followed the applicable standard of review under Section 10(e) of the Administrative Procedure Act, 5 U.S.C. 1009(e). See also *Market Street Ry. Co.* v. *Railroad Commission of California*, 324 U.S. 548, 561-562; *National Labor Relations Board* v. *Mackay Co.*, 304 U.S. 333, 349–351.

[10] Petitioner's claim (Pet. 19) of conflict with *Trunkline Gas Company* v. *Federal Power Commission*, 247 F. 2d 159 (C.A. 5), is accordingly unfounded.

Petitioner contends (Pet. 22–26) that the court below ignored the claim of prejudicial error when it treated petitioner's "continued acquiescence in the understanding that the initial studio would be treated as available" (Pet. App. 4a, 11a) as dispositive of the case.[11] This argument, however, confuses two distinct issues: whether a particular error is prejudicial, and whether, assuming there has been error, the particular litigant has standing to challenge it. The court held that, since petitioner had acquiesced in the assumption that the out-of-town studio was available, it had waived any claim that the Commission's acceptance of that assumption prejudiced it. In other words, appellant suffered no legally cognizable prejudicial error when the Commission decided the case on the ground in which it had concurred—the only ground incidentally, upon which it challenged the order in the court below (see Brief for Appellant in the court below, pp. 12–20, a copy of which has been lodged with the Clerk of this Court).[12]

[11] Whether there was acquiescence, as the court found, is purely a factual question, and the factual basis for that conclusion is not seriously challenged by petitioner (Pet. 24, n. 34).

[12] Petitioner's further assertion (Pet. 25) that the Commission treated the studio issue "as a comparative rather than a qualifying issue" is inaccurate. The Commission ruled both that Television Broadcasters was not disqualified (J. App. 181) and that it should receive a comparative demerit (J. App. 188, 191). Furthermore, Television Broadcasters' post-grant proposal to move its studio site to Beaumont did not require disqualification but only Commission consideration of "whether the change, upon new comparison of the parties, should dictate

2. Petitioner's contention (Pet. 27) that the court of appeals held "that public injury was a necessary prerequisite to review of the Commission's procedural error" is incorrect. The court below did not so hold. The court fully considered petitioner's claim of prejudicial error by the Commission but concluded, upon examination and reexamination of the record, that petitioner had not properly preserved that issue before the agency (Pet. App. 3a-5a, 11a). It then further ruled that, since the issue was not open to petitioner, a remand to the Commission was not required because it would not serve any public interest—particularly since the Commission had approved a new studio site within Beaumont. That ruling was correct. Cf. *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 477; *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, 14.

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a different result". *Enterprise Co.* v. *Federal Communications Commission*, 265 F. 2d 103, 105 (C.A.D.C.); *W. S. Butterfield Theatres, Inc.* v. *Federal Communications Commission*, 237 F. 2d 552, 559-560 (C.A.D.C.); *W. S. Butterfield Theatres, Inc.* v. *Federal Communications Commission*, 272 F. 2d 512 (C.A.D.C.).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

The Government's Brief in Opposition reveals that there is little factual dispute between the parties. The Government assumes, as did the Court of Appeals, that the Commission erred in granting a waiver of its studio rule. However, it maintains that petitioner may not challenge this error because during the proceedings before the Commission petitioner acquiesced in the view that the studio would be treated as available. Thus, it is contended, petitioner is not prejudiced.

This argument is not only factually erroneous, it is immaterial. The erroneous waiver was not based on the fact that the studio was available nor on any finding of agreement or understanding of counsel that it would be treated as available. Its basis was that the studio physically existed and had previously been used and, therefore, the waiver should be granted to avoid wasting the funds expended in constructing it. See Opp. Brief, p. 7 n. 7. When the Commission announced the basis for its waiver, petitioner promptly petitioned for a hearing. It then became undisputed not only that the studio site was unavailable but, more importantly, that the studio itself had been destroyed prior to the Commission's grant of the waiver. The Commission therefore knew that it had granted a waiver for a non-existent studio on the basis of a conclusion that the studio *was* in existence. Rather than withdraw this erroneous waiver, the Commission brushed aside the question and denied the petition for Rehearing on the ground that the hearing was over.[1]

The result is that, contrary to the Commission's Rules and in disregard of the issues designated for hearing, a license was granted to an unqualified applicant in preference to petitioner, who had satisfied every requirement. Clearly, this course of action constitutes prejudicial error for it is because of this error that petitioner's application was denied. Indeed, the

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[1] By this action the Commission rendered its hearing order meaningless by changing its rules "in the middle of the game". Such action, if permitted, is directly contrary to the action denounced by the Fifth Circuit Court of Appeals in *Trunkline Gas Co.* v. *Federal Power Commission*, 247 F. 2d 159 (5th Cir. 1957). (See Pet. 19-20)

Commission could not have reached the result it did reach without making this error.

Through this error of the Commission, petitioner was denied due process and a fair hearing. The Court of Appeals compounded the error by refusing to review the Commission's decision. The substantial questions raised by these actions of the Commission and the Court are discussed in the Petition for Certiorari. Disposition of these questions by this Court should not be denied on the basis of the extraneous matters urged by Respondent.

Respectfully submitted,

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